



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 13, 2003

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-0981

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176455.

The Department of Public Safety (the "department") received a request for information related to controlled substance charges and other information concerning a named dentist. You state that the department is releasing the majority of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.118 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You have submitted to this office for review a report by a Drug Enforcement Administration ("DEA") investigator and a print-out from the department's triplicate prescription database. You contend that the availability of the DEA report is governed by Open Records Decision No. 561 (1990). Where a federal agency shares information with a governmental body in Texas pursuant to a federal policy affording the governmental body greater access to the information than the general public, section 552.101 of the Government Code will except such information from public disclosure if the information is confidential in the hands of the federal agency under federal law. Open Records Decision No. 561 at 7. In Open Records Decision No. 561, the requested information pertained to Department of Justice ("DOJ") investigations, and the DOJ specifically indicated that it considered the information confidential pursuant to provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Under those circumstances, we found that a governmental body was required to withhold the information under section 552.101.

In this case, you argue that the DEA's intent to maintain control over DEA investigator's report is reflected in a warning printed on the face of certain documents. You also state that an individual associated with the Houston branch of the DEA has advised DPS that the information may only be obtained by the public through a FOIA request to the DEA. However, the submitted materials contain no representation from the DEA that the information at issue in this matter is actually excepted from disclosure under FOIA as was the case in Open Records Decision No. 561. Accordingly, based on our review of your arguments and the submitted information, we find that you have not adequately demonstrated that the DEA investigator's report is confidential in the hands of the DEA under FOIA. As you raise no other exceptions under the Texas Public Information Act with respect to this report, we find that you must release this information to the requestor with the following exception.

Portions of the DEA investigator's report are confidential under section 552.101 in conjunction with common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Some of the information in the DEA investigator's report implicates the privacy interests of individuals under section 552.101. Therefore, you must withhold from disclosure the information we have marked based on section 552.101 of the Government Code in conjunction with common-law privacy.

We turn now to your argument that Exhibit B is excepted from disclosure under section 552.118. Section 552.118 provides:

Information is excepted from the requirements of Section 552.021 if it is:

- (1) information on or derived from an official prescription form filed with the director of the Department of Public Safety under Section 481.075, Health and Safety Code; or
- (2) other information collected under Section 481.075 of that code.

Gov't Code § 552.118. You represent that Exhibit B was obtained from "the Department's Triplicate Prescription database that reflects the numbers on prescription forms for Schedule II controlled substances that were forwarded [pursuant to section 481.075 of the Health and Safety Code] to the Department after the prescriptions were filled." Based on your representation, we conclude that Exhibit B is excepted from disclosure under section 552.118, and therefore, the department must withhold this information.

In summary, you must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. Exhibit B must be withheld from disclosure pursuant to section 552.118. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

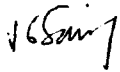
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 176455

Enc: Submitted documents

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(w/o enclosures)